United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

FILED

JUL 2 - 1963

HARRY M. HULL, CLERK

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. 6-63
	:	
JAMES SOUTHERLAND,	:	
CHARLES A. ROSE,	:	
	:	
Defendants	:	

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Washington, D. C.
Wednesday, March 6, 1963

EXCERPTS OF PROCEEDINGS

No. 17821

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 29 1963

Nathan J. Paulson
CLERK

PAGES: 1 to 66

PREPARED FOR: Court files

EVA MARIE SANCHE
Official Court Reporter
United States District Court
District of Columbia

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA :

v. : Criminal No. 6-63

JAMES SOUTHERLAND, :
CHARLES A. ROSE,
Defendants :

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Washington, D. C.

Wednesday, March 6, 1963

The above-entitled matter came on for trial before the HONORABLE EDWARD A. TAMM, Judge, United States District Court for the District of Columbia, and a jury.

APPEARANCES:

For the Government:

MARVIN LOEWY, Ass't U. S. Attorney

For the Defendants:

ROBERT B. BUCKLEY, Esq., and
SAMUEL F. BEACH, Esq.

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EXCERPTS OF PROCEEDINGS

* * * * *

MR. LOEWY: Call Mr. Bourne, please.

Whereupon,

CLAUDE BOURNE

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LOEWY:

Q Mr. Bourne, would you tell the Court and jury your name, please?

A Claude Bourne.

Q And your address?

A 4914 78 Avenue, West Lanham Hills, Maryland.

Q Your occupation?

A I am patrol driver of the National Detective Agency, Incorporated.

Q How long have you been so employed?

A A year and a half.

Q What are the nature of your duties?

A I patrol different clients' businesses looking for theft, fire and so forth.

Q Do you do that on foot or in a car?

A In car and foot.

Q Were you on such a patrol on the night which spans December 13 and 14 of last year?

A Yes, I was.

Q Where were you at 12:30 a.m. on December 14th?

A I was at the Veterans Administration Hospital -- rather, the new one that is being built now at First and Michigan Avenue.

Q Northwest?

A Yes.

Q Is that in the District of Columbia?

A Yes, it is.

Q Would you tell the Court and jury what happened there?

A Well, as I approached the client's premises, I always check the office first and as I was locking the door, coming out, a gentleman came up and tapped me on the shoulder. I didn't know this gentleman. He kind of startled me at first. I turned around and spoke to the gentleman and I asked him what he was doing there.

He said, "Oh, I have a girl friend in my car." He said, "It's all right" -- something to the effects of those words.

So, he then started towards his car which I noticed

was parked about 50 feet from the office. I then went to get into my patrol car to complete my patrol of the premises and as I started to get into my car, I throwed my spotlight on the car he was standing by and happened to see something sticking out from the rear of the car covered with a canvas.

I said, "Now, just a moment. What is this over there sticking out from the rear of your car?" He said, "Oh, that's all right, it's just some bedding I picked up during the day."

I thought it was something kind of funny, having bedding sticking out --

THE COURT: Just say what happened. Don't say what you thought.

THE WITNESS: I am sorry.

BY MR. LOEWY:

Q Well, was it bedding?

A Yes, sir, it was bedding -- no, I beg your pardon. He said it was bedding.

Q Did you investigate to see what was in the trunk?

A Yes, I got out of my patrol car and went over and looked.

Q Was it bedding?

A No, it was not bedding.

Q Will you tell the Court and jury what it was?

A I am not too familiar with construction jobs. As near as I could tell, it was copper of some sort.

Q Now, this man whom you had been conversing with up until this point, is he seated here in the courtroom?

A Yes, he is.

Q Will you point him out, please?

A He is the older gentleman sitting there with the khaki jacket on (indicating).

Q Now, if you know, would you tell the Court and jury what the copper looked like that you say you saw in the trunk?

A As near as I could tell, it was V-shaped, I guess, about seven or eight foot long. I could see about, from where I was standing without touching anything, two or three feet of it. The rest was covered up. The rest of it was sticking back underneath the car.

MR. LOEWY: If it please the Court, I would like to have this piece of copper marked Government's Exhibit No. 1, for identification.

THE COURT: The Clerk will so mark the exhibit.

THE DEPUTY CLERK: Government's Exhibit No. 1, for identification.

(Piece of copper was marked Government's Exhibit No. 1, for identification.)

MR. BEACHE: If the Court please, to save time, we will admit that it was copper in the car and this is an indication of the type of copper, without taking too much time.

THE COURT: Very well.

You may question the witness.

BY MR. LOEWY:

Q You said the copper was V-shaped. Is this the type of shape the copper was in?

A Yes, that is correct.

Q Is that your recollection?

A Yes, uh-huh.

THE COURT: Your reference was to Government's Exhibit No. 1, is that correct?

MR. LOEWY: Yes, Government's Exhibit No. 1, for identification.

THE COURT: Very well. Ask your next question.

2 BY MR. LOEWY:

Q After you discovered that there was copper in the trunk of the car, what happened then?

A Well, I started talking to him. I asked him

where did he get this and then he started hemming and hawing, nothing plausible that I could understand.

MR. BEACHE: If Your Honor please, I hate to object but this is characterizing --

THE COURT: Your objection is sustained.

What did the defendant say?

THE WITNESS: Well, I asked him what he was doing there. He mentioned something about a friend. I didn't see anybody around at that time.

MR. BEACHE: About a what?

MR. LOEWY: I think he said he mentioned something about a friend.

BY MR. LOEWY:

Q Did there come a time when another person appeared on the scene?

A Yes. It wasn't very long afterwards until I noticed coming down from the construction job itself proper, a gentleman approached the car and came up to us.

I asked him what he was doing there too, and he said he was with the other gentleman.

Q Do you see the second person here in the courtroom?

A Yes, I do.

Q Will you point to him?

A Yes. It is the gentleman in the dark blue suit, sitting on the corner.

Q Now, you say that the defendant Rose was coming from the construction site. Now, was he coming from Michigan Avenue?

A No.

Q Was he coming from First Street?

A No.

Q What did you do then?

A I then told the both of them to get into the car. Then, when they got into the car, I asked them to show me their register card so I could try to determine the owner of the car; and they couldn't do it.

I then got into my patrol car, which has the short wave radio to my office, and I called my office and asked them if they would be kind enough to call the police and to send them there.

Q Did the police respond to your call?

A Yes, they were there in about 15 or 20 minutes.

Q Did the police take these two defendants into custody?

A Yes, they did.

Q And did you accompany them to the station?

A I accompanied in my car to the station.

Q And after you had finished in the station -- I presume you did finish -- what did you do then?

A I then came back, back to the client's premises to finish checking it out. Then, upon further checking, I found a trailer which they store material in which had been broken into; the door was wide open and I seen a few pieces of the copper still laying there like what was taken.

Q The same type of copper which you found in the car?

A Yes.

Q Now, as to the location of this shed which had been broken into --

THE COURT: The witness said a trailer.

BY MR. LOEWY:

Q Trailer, I'm sorry -- storage trailer, would you tell the Court and jury the relationship where that storage trailer was located with reference to the direction from which defendant Rose approached you?

A The storage trailer was located approximately 100 feet from where the car was parked and Mr. Rose came, I would say, in a parallel direction of the trailer's.

Q He was coming more from the direction of the trailer --

MR. BEACHE: Objection, if Your Honor please.

THE COURT: Don't testify.

MR. LOEWY: No, I will not, Your Honor.

BY MR. LOEWY:

Q Mr. Bourne, do you cruise that area often?

A Yes, I do, three or four times a night.

Q Three or four times a night. For how long a period of time?

A I am in there anywhere from 20 to 25 minutes.

Q 20 to 25 months, did you say?

A Minutes.

Q And for how many days, weeks or months had you been doing that?

A I myself have personally been patrolling it approximately six months.

Q And would you say you are familiar with that area, Officer?

A Yes, I am.

Q Would you tell the Court and jury what is in the direction from which Rose was approaching?

A That is the main construction of the hospital itself.

Q Are there any streets back there?

A There are no streets back there. The closest

thing to it would be North Capitol Street, which is a good three or four hundred yards from where the office is and where I found these two gentlemen.

Q And what is the terrain between North Capitol Street and where you eventually saw the defendants?

A I would say it is slightly hilly.

Q Is it devoid of foliage or are there woods?

A No foliage or wood but construction equipment, such as, bulldozers and ditch diggers and things like that.

MR. LOEWY: I have no further questions, Your Honor.

CROSS-EXAMINATION

BY MR. BEACHE:

Q Mr. Bourne, did I understand you to say that this was around midnight, was it, sir?

A Yes, sir, it was, approximately.

Q Was it a clear night?

A Frankly, I don't remember, sir.

Q Were you alone?

A Yes, I was.

Q You did not have any associate or companion with you?

A No, I ride by myself.

Q When you first noticed the defendant Southerland,

I believe he tapped you on the shoulder, I believe you said?

A Yes, sir.

Q Where were you standing then, sir, in conjunction with the trailer -- Do I understand that the trailer was being used as a storage room for equipment?

A Yes, sir. They have several of them there.

Q I beg your pardon?

A They have several of them there.

Q So, you were looking at the trailer, were you, when you were tapped on the shoulder by the defendant Southerland?

A No, sir, when I was tapped on the shoulder, I was locking the door of the McShain office.

Q I see. So, it was at the McShain office and not the trailer?

A Right.

Q And so you had finished locking the door to the McShain office?

A Right.

Q And how far was the trailer away from the office, sir?

A Oh, I would say it is about 125 feet, something like that.

Q And I believe you said that -- You asked him who he was, I suppose, did you not?

A Yes, I asked him what he was doing.

Q And he gave you his name, did he?

A I don't recall the name but I do recall him saying that he did work there at one time or something.

Q Did he tell you that he had been working there recently?

A No, I asked him if he was working there -- no, he didn't bring out the point he was working there recently.

Q Did you ask him?

A I asked him did he work there.

Q You say you have been connected with the detective association for a year and a half. What did you do prior to that?

A I was in the credit business.

Q In the credit business. You have never been on the police force?

A No, sir.

Q And did you have a flashlight when you were asking the questions there, sir?

A Yes, sir. I had a flashlight and also a spot-light on the car.

Q I believe you testified that he said the only thing he was doing there is he had a girl friend in the car with him, is that correct?

A Yes.

Q Did you see her?

A No, sir, I saw no girl.

Q Did you ask him why he said that to you?

A He said she had seen me and had run off towards the hospital.

Q You didn't see her run off, did you?

A No, sir.

Q Now, how long was it before you ran into the defendant Rose? How long were you there talking to Southerland when the defendant Rose came up?

A No more than five minutes at the most.

Q No more than five minutes?

A Right.

Q Now, when he came up, how far was he away from you when you first saw him?

A I would say 25 or 30 feet.

Q You didn't see him until he got within 25 or 30 feet of you?

A That is right.

Q Did you pull a gun on him?

A I sure did.

Q Had you pulled a gun on Southerland?

A On both.

Q When Rose got there, did you make them get in your car or did you ask them to get in his car?

A I told them to get into their car.

Q Into their car. Now, at that time did Rose not have some keys to the car?

A At that time, I asked him -- no.

Q He did not?

A Not at that time.

Q All right. Now, when did the time come that he did have keys that he turned over either to you or to someone else?

A He got out of the car once before the Metropolitan Police arrived -- that is Rose?

Q That is right.

A -- and approached me. He said he had keys but at that point I was not interested in keys.

Q I didn't ask you that, what your interest was. If you don't mind, just tell me what the facts are.

When he got out of the car, did you still have the gun on him?

A I had the gun on both of them until the time the

police arrived.

Q I see. So, you had them in their car with the gun on them?

A Yes.

Q Then he got out of the car when you had the gun on him?

A That is right. I told him to get back into the car.

Q I see. What was the reason to get out of the car, Mr. Bourne?

A He claimed he had keys.

Q Did he turn the keys over to you?

A No, he didn't.

Q Did he turn the keys over to anybody in your presence?

A I didn't see the keys turned over to anybody.

Q So, so far as you know, you don't know whether he had keys or not?

A Not actually.

Q Don't you know that while you were there on the premises and when the police came, did not someone try to start that automobile that the copper was in?

A Yes, after the Metropolitan Police boys got there.

Q Who gave the Metropolitan Police boys, as you call them, the keys to the car?

A I don't recall, sir.

Q Well, you saw someone give them to the police, did you not?

A No, sir, I did not.

Q Did someone try to start the car, sir?

A One of the officers did.

Q Was he successful?

A No, sir, he was not.

Q And so thereafter, you turned them over to the Metropolitan Police and they took them in the scout car over to No. 10 Precinct; is that correct?

A Yes, sir.

Q Did you make the complaint in this case?

A I complained to the police themselves there.

Q But in so far as you know, you saw no one go into the trailer, you saw no one go into the office and you saw no one put the copper in the automobile; is that correct?

A Absolutely correct.

Q Now, did you investigate the case after or did you turn it over entirely to the Metropolitan Police Department?

A Turned it over to the Metropolitan Police.

Q And so from that time on, you had nothing further to do with the case?

A That is right.

MR. BEACHE: I have no further questions.

THE COURT: Do you have any questions, Mr. Buckley?

MR. BUCKLEY: No, Your Honor.

THE COURT: Is there any redirect examination?

MR. LOEWY: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. LOEWY:

Q Mr. Bourne, when Southerland approached you from the rear, did you know whether anyone else was on the premises besides him?

A No, I sure didn't.

Q When Rose approached you, did you know whether there were any other men on the premises besides these two?

A No, sir, I sure didn't.

Q Mr. Bourne, would you tell the Court and jury why you pulled your gun?

MR. BEACHE: I would object to that, if the Court please. That is beyond the scope of the cross-examination.

THE COURT: The objection is sustained.

MR. LOEWY: I have no further questions.

THE COURT: You may step down.

(The witness left the stand.)

THE COURT: Call your next witness.

MR. LOEWY: Call Mr. Coppman.

Whereupon,

ARNOLD B. COPPMAN

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LOEWY:

Q Tell the Court and jury your name, please.

A Arnold B. Coppman.

Q Your address, please?

A 17 Brandywine Heights, Brandywine, Maryland.

Q And your occupation?

A My occupation is superintendent of structure.

4 Q Who is your employer?

A John McShain, Incorporated.

Q How long have you been with the McShain Corporation?

A 33 years.

Q At the present time, are you currently employed at a particular job?

A I am on the new Veterans hospital at First and Michigan Avenue, N. W., Washington.

Q And when the trial is over, do you anticipate going back to work?

A Straight back.

Q Are those your working clothes you have on, Mr. Coppman?

A Yes, sir.

Q And is that why you are dressed that way, because you expect to go back to work?

A Yes.

Q How long have you been in the construction business?

A Since 1907.

Q Directing your attention to December 13 and 14, 1962, were you then employed by McShain Corporation?

A Yes, sir.

Q On what job?

A On the new Veterans hospital job, First and Michigan Avenue, N. W.

Q Now, would you tell the Court and jury if there are certain buildings on this construction site? Are there

certain storage buildings on this construction site?

A Yes, there are.

Q And on the morning of December 14, 1962, would you tell the Court and jury what if anything unusual you may have noticed with respect to one of your storage buildings or trailers?

A Well, at about seven o'clock, my labor steward came into my office and said, "Mr. Coppman" --

MR. BEACHE: I object, if Your Honor please.

BY MR. LOEWY:

Q Don't tell what your employee said, just what you noticed. What, if anything, did you notice about these buildings, regardless of how it happened to come to your attention?

A Well, I noticed that the door was broken open.

Q Is that door customarily locked?

A Yes.

Q Was the lock on the door that had been broken in? Was the lock on the door at the time you saw it?

A No, when I saw the door, the lock was laying down at the bottom of the step.

Q Did you examine the interior of this trailer?

A Yes, sir.

THE COURT: The witness has not identified the

building or whatever it was upon which the door was broken.

BY MR. LOEWY:

Q Would you describe this building or trailer which you noticed had the door broken on?

A It is a job shop that we use on various jobs and it was blocked up to use as a warehouse, as a storage warehouse. It had no power to it.

Q Would you tell us one or two of the major items which might be stored in that particular trailer?

A We had copper in there. We had nails in there. We had roofing mastic in cans, in five-gallon cans, and various other items.

Q Thank you. Now, when you approached this shed that you have been talking about and noticed the lock was broken, did you look inside the shed?

A Yes, sir. Yes, I did.

Q Were all of the contents there or were some of them missing?

A No, as far as nails are, I didn't see any of them missing but there was some copper missing.

Q Some copper?

A Yes.

Q Could you describe that copper?

A Well, it's a crimp copper in a V-shape for

expansion joints built into concrete.

Q I show you Government's Exhibit No. 1 marked for identification, Mr. Coppman. Is this the type of copper you are talking about?

A That is exactly what I was talking about.

MR. LOEWY: Your Honor, at this time I would like to offer Government's Exhibit No. 1 marked for identification into evidence.

MR. BEACHE: No objection.

THE COURT: The exhibit will be admitted.

(Government's Exhibit No. 1 for identification was admitted into evidence.)

BY MR. LOEWY:

Q How long were these sheets of copper which you have described?

A Eight feet long.

Q And how many of them were missing?

A 40, I believe.

Q How much did each of these weigh?

A Each one of these weighed approximately eight pounds.

Q Were they tied together or were they loose?

A Well, they were laying cupped in on top of one

another, fitted together with the V-shape down.

Q Fitted together?

A Yes.

Q Who did these sheets of copper belong to?

A To John McShain, Incorporated.

Q If you know, is that a corporation?

A Yes, sir.

Q And on what job was this copper to be used?

A On the new Veterans hospital at First and Michigan Avenue, N. W.

Q How much was this copper worth?

A This copper was worth $10 a sheet; 40 sheets would have been $400.

Q Did there come a time on December 14 when you saw your missing copper?

A I did.

Q Where was that, please?

A It was at No. 10 Precinct police station.

Q Was that copper returned to you thereafter?

A Well, we were notified that it was released by the police department and I carried a truck and labor up to haul it away. It was released to me, yes.

Q Mr. Coppman, do you know James Southerland?

A Yes, sir.

Q Do you see him in the courtroom?

A Yes, sir, I do.

Q Would you point him out in some way?

A That is he sitting right back of the ice water pitcher.

Q Did you see him on December 14th, if you recall?

A No, sir.

Q Did not. Did you know him prior to that date?

A Yes, sir.

Q How did you know him?

A He worked for us as a laborer on this particular job.

Q Now, on December 14, was he employed as a laborer?

A No, sir.

Q On December 13 was he employed as a laborer?

A No, sir.

Q Had he been laid off or released?

A Yes, sir. He had been paid off in full on the 12th of December.

Q When was his employment terminated?

A At that same time.

Q Had he been paid off in full?

A Yes.

Q When is payday at the McShain Company, if you know?

A On Thursdays of each week.

Q Would you tell us, Mr. Coppman, what were Southerland's duties on the job?

A Well, he was a carpenter helper, and he helped generally the carpenters who installed this particular copper on expansion joints. It was his duty while he was employed to go to this shop and carry this copper out to the carpenter --

Q You said "shop"?

A To this warehouse.

Q And to do what?

A And to take it to the carpenters who were installing it.

Q Now, when Southerland worked there a few days before the incident we have been talking about, was that copper stored in that same trailer shed or not?

A Yes.

Q Mr. Coppman, does your firm employ a night watchman?

A Yes, sir.

Q What is his name?

A His name is John --

Q Is it John McNair?

A John McNair, that is right. McNair, I believe it is.

Q Thank you very much.

MR. LOEWY: I have no further questions, Your Honor.

THE COURT: Mr. Beache.

CROSS-EXAMINATION

BY MR. BEACHE:

Q Mr. Coppman, do you know Charles Rose?

A No, sir.

Q Have you seen him before?

A I have seen him in the courts before, that is all.

Q That is the only time you have ever seen him?

A Yes.

Q I am a little confused. We have talked about a warehouse and we have talked about a trailer. What really is the warehouse? Is it a trailer that has no mobility?

A It has no mobility, no.

Q When we speak of the warehouse and we speak of the trailer, it is the same thing, is it?

A It is a warehouse.

Q According to your duties as foreman out there,

had you been in the warehouse the night before December 14th?

A No, sir, not to --

Q Had you been in it the night of the 12th or the day of the 12th, or 11th or the 10th?

A No, my duties did not require me to go into those buildings all the time.

Q Now, that is a Government contract out there, is it not?

A That is right.

Q And I suppose they all subcontract under the Government contract, is that correct?

A We have subcontracts, not under the Government contract.

Q Of course, you have never seen the contract, have you?

A Oh, yes, I have seen contracts.

Q Do you read the contracts?

A I have them in my office.

Q And did the copper belong to any particular sub-contractor?

A No, sir.

Q That was being handled entirely by the McShain Company?

A By McShain, yes.

Q This trailer was on the Government property?

A Yes.

Q And it was locked and, as you say, the lock was down on the floor?

A Yes.

Q But you did not see Charles Rose and you don't know him? He never worked for you and you don't know anything about him?

A To the best of my ability, I don't know the man.

MR. BEACHE: Thank you.

THE COURT: Mr. Buckley.

CROSS-EXAMINATION

BY MR. BUCKLEY:

Q Was the lock broken?

A Yes, sir.

Q How was it broken?

A Well, I can't tell how it was broken. It just looked like somebody struck it. It was an ordinary padlock.

Q Was it in pieces?

A In two pieces, yes, sir.

MR. BUCKLEY: I have no further questions.

THE COURT: Is there any redirect examination?

MR. LOEWY: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. LOEWY:

Q How much did the copper weigh per sheet, if you know?

THE COURT: The witness said that it weighed 10 pounds per length.

MR. LOEWY: I have no further questions.

THE COURT: You may step down.

(The witness left the stand.)

THE COURT: Mr. Marshal, let's take a short recess now.

You ladies and gentlemen of the jury should not discuss the facts in this case with anyone, not even your associates on the jury, during the Court's recess.

(Whereupon at 11:17 a.m., a recess was taken.)

Whereupon,

JAMES J. REHILL

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LOEWY:

Q Will you please tell the Court and jury your

name, rank and duty assignment?

A James J. Rehill, detective at the Tenth Precinct.

Q How many years have you been on the Police Force?

A 13 and a half.

Q Were you a member of the Police Force on December 14, 1962?

A Yes, sir.

Q And were you on duty in the very early morning hours of that day?

A Yes, sir, twelve midnight to eight a.m.

Q Did you receive a call of a crime being committed at First and Michigan Avenue, N. W., on that morning?

A No, sir, I did not.

Q In the early morning hours shortly after midnight, would you tell us what if any calls you did receive?

A At about 12:40 a.m. on the 14th, a radio unit from the Tenth Precinct, one of our uniform radio cars, received a radio assignment to the Veterans Administration grounds at First and Michigan Avenue.

Q Did you subsequently also respond?

A Yes, sir.

Q When you arrived there, will you tell the Court and jury what you saw?

A The radio unit from our precinct was there and a special police officer, Sergeant Bourne, from the National Detective Agency was there. He had in custody the defendant Rose and the defendant Southerland.

Q Upon arriving there, would you tell the Court and jury whether or not you spoke to defendant Southerland or defendant Rose?

A Yes, I spoke to both of them.

Q When you spoke to defendant Southerland, where was the defendant Rose?

A In the vicinity of a 1959 Pontiac. It was a bronze or tan colored 4-door car and the registration bore District tags ST 570. And from the trunk of this car were protruding numerous lengths of copper building flashing. We were in the immediate area of this car when I spoke to Southerland and Rose with regard to the car and building material which was in the trunk of the car.

Q I show you Government's Exhibit No. 1 in evidence and I ask you is this the type of thing which you saw sticking out of the car?

A Very similar, yes.

Q Were all three of you in the vicinity of this car? I am speaking of you, Southerland and Rose.

A Yes, sir.

Q Did you say anything to Southerland?

A I --

MR. BEACHE: If the Court please, I hate to object. Unless Rose was there and participated in the conversation in what Southerland said to this officer, I think I might object.

THE COURT: I believe the previous question indicated that all three of them were together, Mr. Beache.

MR. BEACHE: I am sorry, Your Honor. I withdraw the objection.

THE WITNESS: I queried as to who was in charge of the automobile and if the automobile belonged to either of them. The defendant Southerland stated that he had borrowed this car.

BY MR. LOEWY:

Q From whom?

A He said from the woman he lived with, Mary Phillips.

Q Did there come a time when you checked the ownership of the car?

A The registration was in the glove compartment of the car.

Q Who was it registered to?

A It was registered to Mary Phillips of D Street,

S. E. address.

Q In the course of your conversation with the defendants Southerland and Rose at that time, what else did you determine?

A I asked Southerland how the building material got into the trunk of the car that he had custody of. He said he didn't know how it got there.

Q Did Southerland say anything about Rose?

A Not at the Veterans Administration grounds, no.

Q What was done with this car after you completed your questioning of the two defendants?

A First, we brought the two defendants to the station house and later on, impounded the car and the building material. The car and building material were brought to the precinct.

Q Did you remove the building material from the trunk of the car?

A Myself and my partner, yes, sir.

Q You and your partner. And as best you can, would you describe to the Court and jury the way in which this copper was sitting in the car? Was it separate?

THE COURT: Don't lead the witness.

MR. LOEWY: No, I won't, Your Honor.

BY MR. LOEWY:

Q Would you tell them?

A It was placed in the trunk of the car in five stacks. In other words, these pieces of copper were stacked on top of one another. The largest stack had 17 lengths of copper of this flashing.

Q Was this copper separate, packed loose or was it stuck together in any way?

A These 17 pieces were together although not tied but they laid together in a separate pile, I guess you would call it. It wasn't tied up or anything.

Q So when you came to take them out, did you carry them out pile by pile or piece by piece?

A Pile by pile, the way they were in the car.

Q Now, did you take part in the starting of the defendant's car?

A Yes, sir.

Q You did. And did you start it with a key?

A With a key but we had to put a jumper on it. There was a jumper cable in the car and we had to use additional strength from our battery because that car wouldn't start on its own battery.

Q Did the defendant Southerland say anything else with respect to his relationship to this Mary Phillips?

THE COURT: Will you establish the time and

S. E. address.

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THE COURT: Will you establish the time and

place.

BY MR. LOEWY:

Q At the time you originally responded to the call, did he say anything more?

A Not there.

Q Did he say anything with respect to the defendant Rose's relationship to Mary Phillips?

A He said that Rose was Mrs. Phillips' son.

MR. BEACHE: If the Court please, I hate to object but I think he ought to let the officer testify and not suggest what was said.

THE COURT: You may rephrase your question.

BY MR. LOEWY:

Q Will you tell us what else Southerland said to you at the time when you were standing near this car?

A That wasn't said there; it was at the station house.

Q Tell us what was said at the station house then.

THE COURT: Will you establish who was present and whether these people were in the hearing of each other.

MR. LOEWY: Yes, I will, Your Honor.

BY MR. LOEWY:

Q Who was present in the station house?

A At the station house were myself, my partner,

the defendant Southerland and the defendant Rose. We were in the detectives' office on the second floor of 750 Park Road, which is the station house.

Q Were you standing in a group or separately?

A Right together.

Q Now, would you tell us what was said and by whom, if anything?

A During the conversation, the defendant Rose maintained that he had just come upon the scene at the Veterans Administration grounds; that he had just left or got off of a bus and he requested of me to ask defendant Southerland whether or not this was not a fact; at which time, I did. I asked the defendant Southerland if what the defendant Rose was saying was a fact and Southerland stated to me that, in other words, "All I would say is that he was with me."

He would not say anything else regarding the question that the defendant Rose had asked me to ask to the defendant Southerland.

MR. LOEWY: Will Your Honor indulge me just a moment?

(Short pause in proceedings.)

BY MR. LOEWY:

Q Officer Rehill, if you recall, where did the

keys come from? If you know.

A I don't recall.

Q Are you certain there were keys?

A Yes, there were keys.

MR. LOEWY: No further questions.

THE COURT: Mr. Beache.

CROSS-EXAMINATION

BY MR. BEACHE:

Q Officer, that is all that Southerland said in conjunction with what Rose had asked you to ask him, "He was with me"?

A That is relative to defendant Rose's debarking from a bus, yes, sir.

Q So far as you know, that could have been or did mean that he was there when he was arrested; is that correct?

A I can't assume anything about it, I am sorry.

Q That was an unfair question. I didn't mean it that way.

Did you all attempt to get prints off this copper?

A Yes, sir.

Q Did you find any?

A There were none obtained from this material.

Q Was there any conversation in the presence of --

Strike that.

Did Rose at any time tell you why he happened to be there on the premises?

A No, I can't recall. I can't recall him saying --

Q Officer, were you the only one who was investigating this case?

A My partner was present at that time.

Q He is not here today?

A No.

Q Do you know of your own personal knowledge -- Your partner probably had no conversation with the defendant Rose other than in your presence. Would that be correct?

A That would be; we were both together. Yes, sir.

Q I am not trying to lead you in any way. Was there any conversation at any time by either one of the defendants in the presence of each other that Rose came there to bring the keys to the car that Southerland had left at home in his clothes?

A I don't recall this.

Q You don't recall that. It was established, I believe, by you that this car was in the name of Mary Phillips who is the mother of Charles Rose; is that correct?

A That is the information that I received.

Q And Southerland said he was living with Mary Phillips?

A Right.

Q And he had the use of the automobile?

A Right.

MR. BEACHE: I have no further questions, Your Honor.

THE COURT: Do you have any questions, Mr. Buckley?

MR. BUCKLEY: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. BUCKLEY:

Q When you first saw the automobile, did you attempt to start it on its own ignition and could not? Is that your testimony?

A Not when I first saw it, but there did come a time when an attempt was made to start the vehicle with the keys, yes.

Q Could you?

A No, sir.

Q How did you finally get it started?

A There was a set of jumper cables in the back seat of this Pontiac and there came a time when we jumped

power from the battery of our cruiser to the battery of the Pontiac with these cables and an effort was made, and we were successful in starting the Pontiac at that time.

Q Was this on the job location?

A That is correct, yes, sir.

Q Were there any other vehicles in the area?

A There were some trailers in that area. I don't recall any other vehicles.

Q Any other automobiles or trucks in that area?

A I don't recall any other autos on the location.

MR. BUCKLEY: I have no further questions.

THE COURT: Is there any redirect examination?

MR. LOEWY: None, Your Honor.

THE COURT: You may step down.

(The witness left the stand.)

MR. LOEWY: The Government will rest, Your Honor.

* * * * *

THE COURT: Does the Government have any rebuttal?

MR. LOEWY: I have one witness, Your Honor, that I will call.

THE COURT: Very well.

MR. LOEWY: John McNair, please.

Whereupon,

JOHN R. McNAIR

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LOEWY:

Q Would you please tell the Court and jury your name?

A John R. McNair.

THE COURT: You may sit down. Sit down and talk right into the microphone.

THE WITNESS: John R. McNair.

BY MR. LOEWY:

Q Your address, please?

A 2610 Hamlin Street, N. E.

Q And your occupation, please?

A I am a night watchman.

Q Who are you employed by?

A The McShain Company, John McShain.

Q Are you employed at any particular site?

A I beg your pardon?

Q Any particular place where the McShain Corporation is now working?

A The Veterans hospital right there by the Washington Hospital Center.

Q How long have you been employed there?

A Well, I have been there now going on two years. In fact, I started with the job.

Q Thank you. Were you so employed on December 13 of 1962?

A Yes, sir.

Q And what shift were you working that day, if you recall?

A From four in the afternoon until twelve. I wasn't supposed to go until twelve but when I make my rounds, I usually get off at 11:30.

Q Now, you say you make rounds. Would you tell us briefly the nature of your rounds?

A Well, the nature of my rounds, I start back of the office there right by the labor shed. That is my first key.

The other one, then, is between there to the right, going over to the plumbing shed, oh, I might say near half a block. That is the second one.

The next is placed right on the plumbing shed. That is over there next to North Capitol.

The fourth, you can walk around the building and get

somewhat on the other side of it, I guess that is the west side or south side, but anyway you get around near the next tour. That is the fourth one.

Then, I takes it back to the office.

Q In the course of your rounds, you check these buildings; is that correct?

A Yes, sir. I go through the buildings and I be looking and also on my rounds, I always keep my eyes open.

Q And when you are not walking around, do you sit in any particular place?

A Well, I sit in the office. I am supposed to sit right in the office with the lights off in order to see any car or anyone coming in from the street side. I can look right out. I can see better with the lights out than I could with the light on. That is my orders.

Q Do you know James Southerland, the gentleman sitting there?

A No, I don't know him.

Q Did you see him on December 13th?

A No, sir, I did not.

Q Did you speak to him on December 13th?

A I did not.

Q In the course of your rounds on December 13th, did you notice any buildings which had been broken into?

A No, sir, I did not.

Q Or trailers?

A I did not.

Q Or storage sheds?

A I did not.

Q Did you notice any strange automobiles from your vantagepoint?

A No, sir, I didn't see any.

Q From your vantagepoint, would it be possible for an automobile to be parked either in the open space in front of where you sit or in the general parking area in connection with the site without your seeing it either while you are sitting there or walking around?

A Well --

MR. BEACHE: I object, if Your Honor please.

THE COURT: Just a moment. State the grounds for your objection.

MR. BEACHE: I think it is purely an opinion as to whether or not this man can testify as to whether he would see anything. It is merely an opinion, whether he did see it or could see it.

THE COURT: Will you read the question, Madam Reporter?

MR. BEACHE: I will withdraw my objection, Your

Honor.

THE COURT: Read the question to the witness, then.

(The pending question was read by the Reporter.)

THE WITNESS: No, ma'am, if there had been one there, I would have seen it.

THE COURT: We will recess at this time for luncheon, ladies and gentlemen of the jury.

Remember that you should not discuss the facts in the case with anyone during the Court's recess.

(Whereupon at 12:30 p.m., the trial in the above-entitled matter was recessed until 1:45 p.m. the same day.)

CHARGE TO THE JURY

THE COURT (TAMM, J.): Ladies and gentlemen of the jury, it is now the Court's responsibility to instruct you as to the law that will govern you in reaching your verdict in this case and it is your responsibility to accept the law as it is outlined to you by the Court.

Remember in your discussions in the jury room that the statements made to you by the attorneys in these closing arguments do not constitute evidence in this case.

The closing arguments are efforts on the part of these men who are advocates in these proceedings to portray the evidence in the light that is the most favorable to the client that they represent, that is to the Government and the defendants. The closing arguments of the attorneys, then, do not constitute evidence in this case.

Moreover, the attorneys' recollections of the evidence in the case are not binding upon you. If any of these three attorneys has in any way recalled in his closing argument any of the evidence in such a manner that it differs from your recollection of the evidence, then you should, of course, disregard the attorney's recollection and rely upon your own recollection of the evidence in the case because your verdict must be predicated upon

your own recollection of the evidence.

In our system of jurisprudence we have in the courtroom actually two judges or two groups of judges. The Court is the judge of the law that governs the proceedings in the case. The jurors are the judges of the facts. It is then your responsibility, your sole responsibility and your only responsibility, to determine what the facts are as established by the evidence, and then to apply to those facts, as you find them, the law as it is furnished to you by the Court.

In order to assist you in your deliberations in the jury room, you will have with you there a copy of the indictment returned by the Grand Jury in this case. An indictment is a formal document. It is rather fearsome looking and reading when you examine it, but actually from the viewpoint of evidence it is not proof of any fact.

This indictment does not prove that these defendants committed any act whatsoever. The indictment is not entitled to any evidenciary value in your deliberations. The sole purpose of the indictment is to formally advise the defendants of the charges which have been preferred against them, the charges which they must answer here in open court. That is the sole, the only purpose of the indictment.

This indictment charges these defendants with two separate offenses. The first offense charged is housebreaking. The indictment charges specifically that on or about December 14th, 1962, within the District of Columbia, James Southerland and Charles A. Rose, that is these two defendants, entered the building of John McShain, Incorporated, a body corporate, with intent to steal the property of another.

This is the essence of this charge of housebreaking which is predicated upon the establishment of a crime in the District of Columbia Code, known as housebreaking and which is defined in our Code as follows:

Whoever shall either in the night or in the day time, break and enter or enter without breaking, any dwelling, bank, store, warehouse, shop, stable or other building, or any apartment or room, whether at the time occupied or not -- I want to skip a lot of words here that relate to steamboats, canal boats, vessels and things of that kind which are of no interest to you -- or any lumber, coal, or other goods or chattels are deposited and kept for the purpose of a trade, with intent to break and carry away any part thereof, or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be guilty of the crime of house-

breaking.

In other words, the crime of housebreaking does not apply literally only to houses. It applies to any building, apartment, or room whether at that time occupied or not, with the intent to carry therefrom, anything of value after the entry. That is the crime of housebreaking.

The second count of the indictment charges the offense of grand larceny in the following words:

On or about December 14th, 1962, within the District of Columbia, James Southerland and Charles A. Rose, stole the property of John McShain, a body corporate, of the value of about $400, consisting of 40 sheets of copper of the value of $400.

You may mentally inquire why if this is alleged to be a single transaction, the defendants are charged with two separate offenses? The reason is that when a single act or a series of connected acts violate more than one statute, the defendant may be charged by the Grand Jury with the violation of each law violated in the course of the transaction.

Consequently, the second count of the indictment charges the grand larceny which is described very simply in the District of Columbia Code as the feloniously taking and carrying away of anything of the value of the amount

or value of $100 or more.

The term grand in the definition of a crime as grand larceny, is used to mean large or big. This is the French or continental use of the word grand, meaning something large or big on which in the District of Columbia we place a value of $100 or more.

There is another offense in the District of Columbia Code known as petit larceny, petit meaning small, coming from the French word petite, meaning little. Petit larceny is the taking and carrying away of anything of the value of less than $100. So that we have an indictment charging these two defendants, first with the crime of housebreaking, and the second with the crime of grand larceny, and the taking and carrying away with the intent of depriving the owner of his property therein of property of the value of about $400.

The law is in this case, as it is in every criminal case, that the defendants are presumed to be innocent. Presumption of innocence is one of the very foundations of our system of criminal jurisprudence.

In the non-Anglo-American countries, it is the rule in the criminal courts that when a defendant is charged with a crime, he is required to come into court and affirmatively prove that he is innocent. This

procedure places upon the defendants a difficult and sometimes an impossible burden regardless of the merits of their position; and, consequently, as an outgrowth of our experience with the common law from which our statutory law generally derives, we have adopted the English principle of the presumption of innocence.

This means that every defendant and specifically these two defendants are presumed to be innocent. This presumption then means they are not required to prove their innocence, but rather that the burden of proof is upon the Government to prove the defendants guilty and to prove them guilty beyond a reasonable doubt.

Unless, then, the Government sustains this burden of proof and establishes to your satisfaction beyond a reasonable doubt that these defendants committed each and every element of the offenses with which they are charged, then you, the jury, must find the defendants not guilty.

2 This burden of proof upon the Government, however, is to prove the defendants guilty to a moral certainty, but not to an absolute or mathematical certainty. The term reasonable doubt readily suggests to you that a reasonable doubt is a doubt which is predicated or founded upon reason, as distinguished from a doubt

which might grow out of sympathy or prejudice or any emotional factor.

A reasonable doubt is a doubt for which you can give a reason to yourselves. In the final analysis, reasonable doubt means simply this: If, after a fair and impartial comparison and consideration of all the evidence in this case, the evidence offered by the Government's witnesses, the evidence offered by the defendants, if after this fair and impartial comparison and consideration of all of this evidence you can truthfully say to yourselves that you are not convinced of the defendants' guilt, then you have a reasonable doubt and your verdict should be not guilty.

If, however, after you make this fair and impartial comparison of all the evidence in the case, you can truthfully say to yourselves that you have an abiding conviction of the defendants' guilt, such a conviction as you would be willing to act upon in the more important and weighty matters in the course of your own daily lives, then you have no reasonable doubt and your verdict should be guilty.

In reaching your determination as to whether the Government has established the charges contained in this indictment and established them beyond a reasonable doubt,

you have the duty of evaluating the credibility of the witnesses. This means simply that you must determine which of these witnesses you are going to believe and to what extent you are going to believe them.

In reaching your determination as to how much credibility you will give to the testimony of each witness, you have the right to consider the demeanor of each witness on the witness stand, his manner of testifying, whether the witness impresses you as having an accurate memory and recollection of the facts about which he is testifying, whether the witness displays any favor or prejudice toward the Government or towards the defendants, whether the witness has or displays any interest in the outcome of the case, and I think most important of all, whether the witness impresses you as being a truth-telling individual.

If you believe that any witness willfully testified falsely as to any material fact concerning which the witness could not possibly be mistaken, you are then at liberty, if you deem it desirable to do so, to disregard the entire testimony of that witness or any part of the testimony of that witness.

You are further instructed that although the law makes each of these defendants a competent witness in his

own right, you, nevertheless, have the right to take into consideration the defendant's situation, the circumstances which surround each of the defendants, and you should give to their testimony the weight that you believe it is fairly entitled to receive.

The defendant Southerland has admitted a housebreaking conviction. It is not certain in my recollection as to whether it related to one or to two housebreaking convictions. The witness said 19 and 41 and 19 and 59 housebreaking. Whatever your recollection is about whether that related to one or two convictions is for you to determine.

However, the District of Columbia Code provides that no person shall be incompetent to testify in either civil or criminal proceedings by reason of his having been convicted of a crime, but such fact may be given in evidence to affect his credit as a witness.

This means very simply the fact that this man has admitted one or more convictions in the past may not be considered by you as being evidence that he committed the present offense. You may consider this admission of a prior conviction or convictions only in so far as it affects the defendant's credibility as a witness in the present case.

You may wonder why we have such a provision in the District of Columbia Code. It was the rule that the common law of England from which, as I said, most of our law derives, that no person could ever testify in a civil or criminal proceeding if he had once been convicted of a crime. This harsh rule of law placed a very difficult burden upon the courts and jurors and lawyers and litigants because often the only witness to a particular fact might be a person who had been previously convicted of a crime, and consequently within the 20th century, in the various states of the United States and in the District of Columbia, statutes have been enacted similar to the one which I have just read you, which says conviction of a crime does not deprive a person of his competency as a witness, but the fact of his conviction may be brought forth for whatever effect it may have upon his credibility as a witness in the current proceeding.

The Government relies in some measure in this case upon an inference which you are permitted to draw from what the Government says is one or both of the defendants' possession of recently stolen property. The law upon this subject is as follows: It is a rule of our law that when recently stolen property is found in the exclusive possession of someone, the jury may infer from

the fact of such possession that the possessor of the property was in fact the thief.

If from the evidence you should be convinced beyond a reasonable doubt that the property here in question was stolen and that the defendants, or either one of them, soon after its theft were in exclusive possession of it, that is a circumstance to be taken into consideration by you in determining your verdict.

Unless the possession of recently stolen property is satisfactorily explained either by the defendants, or either defendant, or by the facts and circumstances brought out in the trial, the fact of such possession is a sufficient basis to warrant your finding a defendant or both defendants guilty.

The Court instructs you, however, that while you are permitted under the law to draw an inference of guilt from the fact a defendant was discovered in exclusive possession of recently stolen property, you are not required to do so; nor, if you do draw the inference are you required on that basis alone to find the defendants or a defendant guilty, although you may do so. If the defendant's explanation of his or their possession of their property is in your opinion truthful, if it is consistent, if it is apparently honest, if it is not

contradicted by other facts in the case, if the explanation has the indicia of truth connected with it, then the possession of the defendants or by the defendants, or either one of them, of the property ceases to be a basis for an inference of guilt.

But if this possession is not explained to your satisfaction, you are permitted but not required to infer that a defendant or the defendants were guilty of the theft. The question then becomes what is possession in the individual case?

Possession has been stated by our court of appeals to be a question of fact for the jury in that it is for you, the jury, to determine from all of the evidence in the case whether the Government has proved that either of these defendants or both of them were actually in exclusive possession of this property.

There is one other factor in the trial of this case which I believe requires some comment on the part of the Court, and that is the lack of any direct evidence that these defendants or either of them participated in the breaking in of the warehouse as it is variously described or in having possession of the copper flashing and loading it in the automobile.

The Government relies in large measure in this

regard upon what we call in the law circumstantial evidence. The law recognizes two types of evidence, direct evidence which is the testimony of a witness as to things which he actually saw or heard, or felt.

In other words, testimony resulting from the witness's experience in the use of his senses in recording certain facts. The other type of evidence is described as circumstantial evidence and I repeat, the Government relies in this case on circumstantial evidence. What is circumstantial evidence? I suppose as satisfactory a definition as I can give you is contained in the following quotations from a recognized textbook of evidence. Circumstantial evidence is that evidence which relates to a series of other facts than the facts in issue, whereby experiences have been found to be so associated with the fact that in the relation of cause and effect they lead to a satisfactory conclusion. For example, when footsteps are discovered after a recent snow, it is proper to infer that some animated thing passed over the snow since it fell. And from the form and the number of footsteps it can be determined whether they are those of a man, a bird, or a quadruplet. Such evidence is founded on experience and observed facts.

Coincidences establishing a connection between

the known and the proved facts and the facts sought to be proved are known as circumstantial evidence. Circumstantial evidence is, of course, proper evidence in any case and may be utilized by the jury as the basis for returning a verdict of guilty if the jury believes that the circumstantial evidence proves the guilt of a defendant or defendants beyond a reasonable doubt.

It is, I repeat again, the Court's responsibility to instruct you as to the law that will govern you in reaching your verdict. It is your responsibility to accept the law as it is outlined to you by the Court. You are the sole, the exclusive judges of the facts. The Court cautions you not to permit your judgment, your intelligence, or your reason to be swayed by sympathy, by prejudice, by bias or by ill will.

You should not be influenced by your feelings or your emotions. Your verdict should be reached in accordance with the solemn oath you took, that you would well and truly try this case and a true verdict render in accordance with the evidence and in accordance with the law as it is outlined to you by the Court.

Your verdict must be a unanimous one which means that all 12 of you must concur in your verdict. You must return a separate verdict as to each defendant, as to each

of the two counts of the indictment. The verdicts are entirely independent of each other. You may find either defendant guilty or not guilty upon either of the counts of the indictment without any reference to what finding you make with reference to the other defendant on that or the other count of the indictment.

What verdict may you return in the case? With reference to the first count as to each defendant you may return a verdict of either guilty or not guilty. On the second count of the indictment with reference to each defendant you may return any one of three verdicts: either guilty as charged, which is guilty of grand larceny; or in the alternative, guilty of petit larceny, which is as I defined, the taking of property under $100 of value; or, your third verdict, can be not guilty. That is on the second count of the indictment.

Why are you permitted to return a verdict of guilty of petit larceny on the second count of the indictment? This optional verdict with you grows out of a doctrine of our law which says a jury has the right to return a guilty verdict upon any lesser count which is included in the greater count of the indictment.

Since in the second count these defendants are charged with grand larceny and since petit larceny is a

lesser offense, you have the right, if you believe the evidence justifies it, to return a guilty verdict of a lesser charge on the second count of the indictment. I repeat then on the first count of the indictment as to each defendant, your verdict may be guilty or not guilty. On the second count with reference to each defendant, your verdict may either be guilty as charged, which is guilty of grand larceny; or guilty of petit larceny; or not guilty.

THE COURT: Will counsel approach the Bench?

(At the Bench:)

THE COURT: Does the Government request any further charge?

MR. LOEWY: No, Your Honor.

THE COURT: Do you have any objections to the charge as given?

MR. LOEWY: None whatsoever.

THE COURT: I will assume for the record counsel renew at this time any requests for instructions previously requested in which the Court did not charge.

I will assume you renew any motions or any objections to evidence, if any, heretofore voiced to the Court in order that you are completely protected on all objections throughout the trial.

MR. BUCKLEY: Yes, sir.

THE COURT: Mr. Buckley, do you request any further charge?

MR. BUCKLEY: No, Your Honor.

THE COURT: Do you have any objection to the charge as given?

MR. BUCKLEY: No.

THE COURT: Mr. Beache?

MR. BEACHE: I have no objection to the charge and I do not request any further instructions.

THE COURT: Very well.

(In open court:)

THE COURT: Upon reaching the jury room you will select one of your members to serve as foreman and the foreman will preside at your deliberations and speak for you in advising the Court of your verdict.

I want to say just one thing more. There is no time pressure upon you from the viewpoint of reaching your verdict. If you have not reached a verdict by approximately half past four this afternoon, the Court will call you back into the courtroom and excuse you until tomorrow morning when you will return to this courtroom to continue your deliberations.

I want you to know that so in your study and

consideration of this case you will not feel for any personal reasons you have to get away at any special time or that if you do not immediately reach a verdict, you are going to be kept here throughout half of the night. As I said, if you haven't a verdict by half past four, you will be excused in order to make your customary arrangements for transportation to your homes and you will return tomorrow morning to continue your deliberations, so there is no time pressure upon you to reach your verdict in this case.

The jury may retire, Mr. Marshal.

(The jury left the courtroom at 3:00 p.m.)

THE COURT: Thank you, gentlemen. You may be excused if we can reach you in a reasonable time. If the jury does not reach a verdict by approximately half past four, I will bring them back into the courtroom and excuse them after admonishing them not to discuss the facts in the case until tomorrow morning. You may be here at that time if you want to. The Court will not require it unless you specifically want to be here.

(The Court recessed at 3:05 p.m. for 10 minutes.)

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,821

JAMES SOUTHERLAND,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court
for the District of Columbia

JOHN J. SPRIGGS, JR.
500 N. Capitol Street
Washington, D. C.

Attorney for Appellant

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 2 1964

Nathan J. Paulsen
CLERK

QUESTIONS PRESENTED

1. Whether the evidence supported the verdict or whether a reasonable mind would have had a reasonable doubt of appellant's guilt?

2. Is the verdict contrary to the weight of the evidence adduced at the trial?

3. Did the appellant have sufficient assistance of counsel at the trial below?

4. Did counsel for the appellant, appointed by the Court, by his failure to call defense witnesses to the stand or subpoena defense witnesses upon request of the appellant, deprive the appellant of a fair trial, or deny him due process of law, or deprive him of witnesses in violation of the 5th and 6th amendments to the Constitution of the United States.

5. Is appellant entitled to invoke the newly discovered evidence rule to produce evidence counsel failed to produce at the trial?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,821

JAMES SOUTHERLAND,

Appellant,

v.

UNITED STATES OF AMERICA

Appellee.

Appeal From the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant, James Southerland, was on January 7, 1963 indicted and charged with two separate offenses. The first offense charged was of housebreaking on or about December 14, 1962. The second offense charged was that of grand larceny consisting of 40 sheets of copper of the value of $400.00. Both offenses, it was alleged, involved the property of John McShain, Inc., which was then in the process of constructing a building in the vicinity of 1st and Michigan Avenue, N.E., Washington, D.C.

After the indictment was returned, counsel was appointed by the court for the appellant, James Southerland, who, the indictment charged,

committed the two offenses with a co-defendant, Charles A. Rose.

A trial was had on March 6, 1963 in the United States District Court for the District of Columbia. The co-defendant, Charles A. Rose, was found not guilty by the jury hearing the case on March 7, 1963. Appellant, James Southerland, was found guilty of both charges by the same jury.

On March 7, 1963, appellant noted an appeal; he requested leave to proceed without costs which was granted on April 23, 1963.

On April 24, 1963, an order was signed referring the case for appointment of counsel to perfect the appeal. Thereafter, counsel, appointed by the court, requested leave to withdraw from the appeal which was granted by this court, after present counsel had entered an appearance on behalf of the appellant. Jurisdiction is vested in this court by virtue of Title 28 USCA section 1291.

STATEMENT OF FACTS

The appellant, James Southerland, was found guilty of the crimes of housebreaking and grand larceny by the jury on March 7, 1963. The alleged offense occurred in the vicinity of 1st and Michigan Avenue, N.E., Washington, D.C. while John McShain Inc., a body corporate was engaged in constructing a veterans administration building on the site. From the testimony adduced at the trial it appears that James Southerland was, at the time, living at 5322 B Street, S.E., Washington, D.C., at the home of Mary Phillips.

He had been employed by the John McShain Construction Company during the course of the construction project (Excerpts of Proceedings p. 3). On Thursday, December 13, 1962, he went to the job site to pick up his pay at about 1 p.m. (excerpt of proc. p. 4 & 9). After he picked up his pay, he went to get into the car he was driving but the car wouldn't

start (excerpts of proceedings, p. 5). The car which appellant was driving at the time was owned by Mary Phillips, who had given appellant the use of her car during the time appellant was living at her home (excerpt of proceedings, p. 43 & 44). Appellant then left the car sit on the lot (ex. p. 9). He then went over to talk with a girl, who worked as a cook on the job, named Juliette (ex. p. 9, 10 & 14). Due to his talking to her, he caused her to miss her bus, so he agreed to take her home in a cab (ex. p. 15). He then went to Daly's Insurance Company on Massachusetts Avenue, N.W., (p. 15), and then went to 12th Street, N.E., where he had a few drinks before going on home about 4 or 5 p.m. (ex. pages 16 & 17).

Later that evening, that is about 9:30 p.m., the appellant went back out to the construction site to get the car (p. 19). When he got there he found that he had left his car keys in his other pants pockets (p. 19 & 20). So he then went to the Washington Hospital Center and called back to his home and requested Charles Rose, the co-defendant, to bring him the keys to the car (p. 5). While he was waiting for Charles to bring the keys, he tapped a night officer, from the detective agency employed by McShain to patrol the job site, on the shoulder. The officer turned his spot light on a car parked nearby and saw some copper tubing sticking out of the rear trunk of the car and accused the appellant of stealing it (p. 7 & 8, vol. 1, Excerpts of Proceedings). While he was holding the appellant, Charles Rose came up with the keys to the car so the night officer held them both until the police came (ex. vol. 1, page 9 & 10).

After the Metropolitan Police Officers came upon the scene, they, too, were unable to start the car without the use of jumper cables running from the battery of the police car to the battery of the stalled vehicle because it would not start on its own battery (ex. vol. 1, p. 35 & 36.) Appellant at that time admitted that he had borrowed the stalled car but denied any knowledge as to how the copper got into the back of the car (ex. vol. 1, p. 35).

Appellant now states as one of his basis for appeal that during the trial of the case, he had requested his counsel, appointed by the court to subpoena Mary Phillips, who loaned him her car; the girl named Juliette, with whom he talked that afternoon and took home; Daly's Insurance Company from whom he secured insurance that afternoon; and the office manager from John McShain Company. Appellant requested these witnesses be subpoenaed to verify that he did leave his home, just prior to the time he was arrested, to pick up the automobile. That he had, in fact, been on the job that afternoon and did, in fact, pick up his pay check. (A fact which a government witness disputed saying that he had been laid off and had been paid off in full on December 12, 1962, a day before the offense occurred) (Arnold Cappman, Excerpt, vol. 1, p. 26). That he did talk to Juliette, who cooked at McShains and whom he took home that afternoon and who was a girl friend of one of the men working on the construction site on the day this offense was supposed to have occurred. Appellant's counsel now has a statement under the signature of Paul S. Fry, office manager for John McShain, Inc., which repudiates the statement of government witness, Arnold Cappman, who stated that appellant had been paid in full on December 12, 1962. The statement indicates that the appellant had been employed by John McShain, Inc., from November 10, 1961 to December 11, 1962 and that he had picked up his final pay from the company on December 13, 1962. Counsel also has a statement from Daly's Insurance Centers stating that on December 13, 1962, James Southerland applied for auto insurance at 15th and H Street, N.E. In addition, Mary Phillips, if she had been called would have corroborated his statement of the approximate time he left home to get the car and could testify that he did call back to have Charles Rose bring him the keys to the car at about the time the appellant had testified. All of these statements would appear to be strong corroborating evidence on behalf of the defendant, which would tend to cast doubt on his guilt and which, he

had a right to demand as witnesses on his behalf under the 5th and 6th amendments to the United States Constitution.

STATUTES INVOLVED

Title 22 sections 2201 and 1801 D.C. Code 1961 ed and the 5th and 6th amendments to the Federal Constitution.

STATEMENT OF POINTS RELIED ON

1. The Court erred in failing to grant the appellant's motion for judgment of acquittal.

2. The Court erred in allowing jury to speculate as to appellant's guilt without sufficient evidence and to stray into the realm of pure surmise, bias and prejudice, when speculating as to appellant's guilt.

3. Counsel appointed by the Court erred in not subpoenaing defense witnesses as requested by the appellant.

4. The verdict as rendered is not supported by the evidence and is contrary to the evidence.

5. Appellant was denied his constitutional rights under the 5th and 6th amendments to the constitution.

SUMMARY OF ARGUMENT

The prosecution failed to present sufficient proof to establish appellant's guilt in the Court below in that it did not establish that it was the appellant who broke into the building or trailer where the copper was alleged to have been stolen from John McShain Co., Inc. Indeed, no evidence was actually presented showing that the copper found in the appellant's automobile was, in fact, taken from the premises of John McShain, Inc.; or was in his actual exclusive control and possession of

the copper. Moreover, there was no evidence connecting the appellant as having touched the copper he was alleged to have stolen or that he took it from John McShain, Inc., with the intent to deprive the owner of it permanently as required by the D.C. Code Title 22 section 2201 or that he aided and abetted anyone who might have taken the property alleged to have been stolen by appellant. Apparently, finger prints were taken from the copper but was unsuccessful in establishing them as the appellants.

The evidence at its best only established that a door was found open, and a padlock was lying broken on the ground on the following morning at 7:30 a.m. Nowhere did it establish beyond a reasonable doubt that the appellant forced the lock or entered upon the premises for the purpose of removing property therefrom. His finger prints were not shown to have been present upon the open door, the lock or the copper. It seems clear that upon the evidence in the case that a reasonable mind must necessarily have had a reasonable doubt of the appellant's guilt and therefore his motion for judgment of acquittal should have been granted. Curly v. U.S., 81 U.S. App. D.C. 389, 392, 106 F2d 229.

However, in spite of the failure to grant the motion, it would appear that his appointed counsel's failure to subpoena witnesses on his behalf at appellant's request, constituted a violation of his constitutional rights provided by the 5th and 6th amendments. Downer v. Dunaway, 53 F2d 587, 589.

ARGUMENT

I.

Whether the evidence supported the verdict and whether the verdict was contrary to the weight of the evidence produced at the trial.

In looking over the testimony and evidence presented by the government during the trial below, it would appear that reasonable men would

entertain a reasonable doubt of the appellants' guilt of the offenses charged and that the evidence is insufficient to support the verdict of guilt of the appellant.

Claude Bourne, a patrol driver for the National Detective Agency, Inc., (Excerpts of proceedings, p. 3) stated that during the night and early morning hours of December 13 & 14, 1962, while he was at work for John McShain Inc., then in the process of constructing a Veterans Administration Hospital at First and Michigan Avenue, N.W., (p. 4) he was locking an office door (p. 13) when the appellant came up and tapped him on the shoulder; that he didn't know the gentleman and so he asked him what he was doing there (vol. 1, p. 4). That the appellant said something about a girl friend in his car (p. 4), that he worked for McShain (p. 14) and started walking towards a car parked some 50 feet from the office, he had been locking (p. 4 & 5). He then went to get in his patrol car and threw his spotlight on the car; that when he did so he noticed something sticking out from the rear of the car covered with a canvas; that he asked the appellant what it was and was told that it was some bedding; that he went over to investigate and found it to be copper of some sort (vol. 1, ex. p. 5 & 6). The copper then introduced into evidence. Claude Bourne then testified he asked appellant where he got the copper; that appellant hemmed and hawed but said nothing plausible that he could understand; that he asked him what he was doing there and was told something about a friend; that he didn't see any friend but another man did come up a little later (vol. 1, p. 8) who he identified as Charles Rose; that he was coming from Michigan Avenue (p. 9); that he then asked them for the registration card on the car and called police when they couldn't produce it (p. 9); that the police came in 15 to 20 minutes and took them into custody (p. 9); that he followed the police to the station, then he returned to the job where he found a trailer door wide open and some similar copper was lying there; that the trailer was

approximately 100 feet from where the car was parked and 125 feet from the office door he was locking when appellant tapped him on the shoulder (vol. 1, p. 13). He also testified that when the police came they tried to start the car but it wouldn't start; and that in so far as he knew, he saw no one go into the trailer, into the office and he saw no one put the copper in the car (vol. 1, p. 18); that after he turned the parties over to the police he had nothing further to do with the case (p. 19).

The next government witness, Arnold B. Cappman, who testified that he was a superintendent of structure, employed by John McShain, Inc., (vol. 1, ex. of Proceedings, p. 20) on the veterans hospital where appellant was arrested; that on the morning of December 14, 1962 the labor steward came to his office at about 7:00 a.m. (vol. 1, p. 22) that he then noticed that a door was customarily locked was open; that he saw the lock to the door laying down at the bottom of the step; that the opened door was to a job shop used as a storage warehouse (vol. 1, p. 23); that copper was stored therein, nails and roofing mastic and other items; that 40 sheets of the same copper was missing (vol. 1, p. 23) and the copper was valued at $10.00 a sheet; that he, together with a laborer went to police station #10 and the copper was released to him and that the copper belonged to John McShain Inc., (vol. 1, p. 25). He further testified that appellant had been employed by John McShain; that he was not so employed on December 13th or 14th because he had been paid in full on December 12th (vol. 1, p. 26). (This last statement appears to be false.) He then testified that when appellant had been employed, his duties consisted of helping the carpenters and this involved carrying copper to the carpenters, when needed for installation (vol. 1, p. 27). He then testified that John McNair was the night watchman employed on the job (p. 28). On cross-examination he testified that he had not been in the warehouse on the night before December 14, 1962, nor on the 10th, 11th or 12th (vol. 1, p. 29). He further testified that he couldn't tell how the lock was broken (p. 30).

The next witness, James J. Rehill, a Metropolitan police detective, from No. 10 precinct, testified he had investigated the crime for the police department (vol. 1, p. 32); that when he reached the scene, copper was protruding from a car parked by appellant; that appellant told him the car belonged to Mary Phillips and that he had borrowed it (vol. 1, p. 34); that appellant when asked how the material got in the car told him he didn't know. (vol. 1, p. 35). He testified that the car wouldn't start until he put a jumper on it (vol. 1, p. 36) because its battery was down. On cross-examination he testified that he had tried to get finger prints from the copper but obtained none of appellant (vol. 1, p. 39).

The next witness, John McNair, the night watchman testified (vol. 1, p. 43 & 44) he worked the 4 p.m. to twelve shift (p. 44); that in performing his duties he checked the buildings (p. 45) that when he wasn't walking his rounds he sat in the office with the lights out to see the area better (p. 45). He then testified that he did not see appellant on December 13, 1962; did not notice any buildings or trailers broken into or any strange autos parked in the area and that if there had been one he would have seen it (vol. 1, p. 46 & 47).

Lumping all the evidence produced during the trial of this case, one cannot help but notice the total lack of any direct evidence that the appellant, James Southerland, actually physically participated in the breaking or entering into any warehouse on December 13th or 14th with intent to steal or commit any other criminal offense therein. From this evidence there certainly was no direct evidence that appellant removed any article from the warehouse or that he had in his exclusive possession and control or that he ever loaded any copper flashing or other copper into the automobile. On the contrary, it is undisputed that he denied doing so and no evidence such as his fingerprints was to show he had done so. Moreover, there appears to be no circumstantial evidence that the appellant did so. The only evidence established by the

government was an open door, a broken lock and some copper flashing in the back of an automobile appellant claimed that he abandoned that afternoon because it wouldn't start. One of the government witnesses seemed to corroborate appellant's position by his testimony that he was a night watchman with the lights out in the office of the company to better observe and detect trespassers. Yet, on these dates, he neither saw appellant on the premises or a warehouse that had been broken into or that he saw any automobiles in the area. On the contrary, it was his opinion that there had been none because if there was one, he would have seen it.

It seems clear that this evidence could not be reasonably regarded as proving beyond a reasonable doubt that this appellant was guilty of house-breaking or grand larceny. Accordingly, as has been stated by this court in the case of Farrar v. United States, 107 U.S. App. D.C. 204-206, 275 F2d 868.

> "We must reverse a criminal conviction when it is clear to us that upon the evidence * * * a reasonable mind must necessarily had a reasonable doubt as to * * * guilt. The conviction is therefore reversed and the case remanded to the District Court with directions to enter a judgment of acquittal."

To the same effect this Court so held in the case of Hopkins v. U.S., 107 U.S. App. D.C. 126, 275 F2d 155, wherein a petition for rehearing En Banc was denied January 19, 1960; and Middleton v. United States, 106 U.S. App. D.C. 50, 269 F2d 241. As stated in another was by this Court in the case of Hammond v. United States, 75 U.S. App. D.C. 397-398, 127 F2d 752,

> "In the present case there was, as there always is in a criminal prosecution, a legal presumption that appellant was innocent until proved guilty beyond a reasonable doubt. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is trial judge's duty to instruct jury to return verdict for accused, and

> where all substantial evidence is as consistent with innocence as with guilt, it is duty of appellate court to reverse a judgment against accused."

In the light of the evidence and of the circumstances of this case, it would seem impossible that a jury of reasonable men could have fairly reached the conclusion that appellant actually or did, in fact, break and enter any trailer or warehouse belonging to John McShain, Inc., as he was charged or that he did, in fact, take and carry away with intent to deprive the owner permanently of the copper flashings as he was charged. Indeed, it would seem even doubtful that the prosecution proved as an undisputed fact that John McShain was the actual owner of the purported copper flashing. The conclusion that he did, would be pure conjecture. Probably based on appellant's testimony of a prior conviction. In any event when speaking of conjecture, this court has long held in cases similar to this case that not only where there is no evidence which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, a motion for a directed verdict of acquittal should be granted. But further, as stated in Cooper v. United States, 94 U.S. App. D.C. 343-345; 218 F2d 39-41,

> "The applicable rule is laid down in Curley v. United States. We there pointed out that in the trial of criminal cases there are functions for the judge, and functions for the jury; that the judge must not impinge upon the functions of the jury; that the verdict is for the jury upon the facts and the finding of facts is for the jury; that, however, the judge must not allow the jury to speculate guilt without evidence or to stray into pure surmise, bias or prejudice."

From the evidence in this case, the jury must have necessarily had to stray into pure surmise, bias or prejudice to reach the conclusion they reached in this case. Under such conditions the verdict should be reversed and remanded to the District Court to enter a judgment of acquittal or grant a new trial. See also Curley v. United States, 81 U.S. App.

D.C. 389, 392; 160 F2d 229, cert denied 331 U.S. 387, 67 S. Ct. 1511.

II

The next question presented in this case relates to the rights of an accused under the 5th and 6th amendments to the Federal Constitution.

The appellant complains that his counsel appointed by the court failed to protect his right to compulsory process to obtain witnesses on his behalf. His chief complaint is that he requested subpoenas to be sent or issued to produce Mary Phillips, who owned the automobile in which the copper was found and who would verify he left home just before to get the car. The office manager of John McShain, Inc., who would verify that he came on the job Thursday afternoon December 13, 1962 to get his pay. A woman named Juliette who worked as a cook on the job site for John McShain who would verify that the appellant took her home that afternoon and also that she was seeing a man who worked on the job quite regularly. This evidence might add to the doubts in the case by showing jealousy as a motive for some third person to plant the copper in the automobile which was stalled and which appellant would, no doubt, come out to take home. Appellant also states that he requested a representative of the Daly Insurance Center be subpoenaed to verify the fact that appellant was, during the afternoon at the insurance center to purchase car insurance.

In view of the other evidence submitted at the trial, it would seem possible that these witnesses would have been material and even vital to the appellant's case during the trial and their failure to testify might well raise serious questions of the duties of the court in relation to appointed counsel and whether a failure of counsel to subpoena available witnesses would constitute a denial of due process of law, in so far as appellant was concerned, as well as a denial to him of compulsory process to obtain witnesses in his favor, in violation of the 5th and 6th amendments.

The duties of appointed counsel were discussed in the case of

Downer v. Dunaway, (5th cir) 1931; 53 F2d 586, 589. In this case the court laid down the rule that an accused, who is unable, because of poverty to employ counsel, is entitled to be defended in his rights as fully as an accused who was able to employ counsel. Moreover, the court also held that it was the duty of counsel, appointed to represent an accused too poor to employ counsel, to make necessary motions for continuances, change of venue, and new trial. In other words, an appointed counsel is under a duty to represent an accused with the same vigor as one who was retained by an accused. While in the instant case, appointed counsel did make a motion for a new trial, he did not, during trial subpoena certain witnesses as requested by appellant, who believed their testimony would aid in his defense, and who, in this case, no doubt would have been an aid to his defense. See also Powell v. State of Alabama, 287 U.S. 45, 52, 53 S. Ct. 55.

These failures raise questions of due process, fair trial and compulsory process for obtaining witnesses as guaranteed under the 5th and 6th amendments. Their importance was stated in United States v. Johnston, (6th cir., 1959) 318 F2d 288, 291, where an accused wanted to employ counsel, but the counsel could not appear in court on trial date because of other commitments and the judge refused a continuance and appointed counsel to represent the accused, the conviction was later reversed in the appellate court in this case where it was stated on page 291,

> "It has been said that the first 8 amendments and the 14th amendment are essential against arbitrary or unjust deprivation of human rights! Judge Leonard Hand said in a lecture at Harvard that these amendments are * * * generally regarded as embodying the same political postulates that had been foreshadowed, though not articularly in the exordium of the Declaration of Independence; self evident and unalienable rights with which all men are endowed by their Creator and among which are life, liberty and the pursuit of happiness."

To the same effect Glasser v. United States, 315 U.S. 60, 62 S. Ct.

457, applying this rule to the instant case, it would appear these unalienable rights given to man by his God would require assurance that counsel appointed by the court would subpoena witnesses when requested by one accused, unless it was certain that the witnesses testimony would have no relevancy to the issues of the case in any manner. Such would appear not to be the case here. So, since counsel overlooked, whether by illness or otherwise or failed to subpoena material witnesses it becomes the duty of the court when it is brought to its attention to grant a new trial so those witnesses can be called, see also Moore v. Dempsey, 261 U.S. 86-91; 43 S. Ct. 265, 267 which held substantially that if a trial was dominated by mob rule, there is a departure from due process of law, and the trial was voided. See also Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472.

Almost all of our courts generally hold that the first 8 amendments to the United States Constitution were intended to guarantee substantive rights and that the courts would provide procedural standards and safe guards adequate and appropriate to protect at all times people charged or suspected of crime by those holding positions of authority. Reed v. U.S., 291 F2d 856, and numerous other important cases.

CONCLUSION

We conclude; therefore, that the verdict for guilt should be set aside or remanded to District Court with instructions to enter a judgment of acquittal or a new trial granted to allow appellant adequate safeguards to his defense.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,821

JAMES SOUTHERLAND, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JEROME NELSON,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

(1) Whether there was sufficient proof that appellant had possession of recently stolen copper material, where it was shown:

a. that the material was found in an automobile;
b. that at the time in question appellant stood by the vehicle and referred to it as "my car";
c. that appellant had in fact borrowed the car from a woman with whom he lived;
d. and that at the outset appellant referred to the property in question as "bedding I picked up."

(2) Whether this proof, together with several other incriminating circumstances, was sufficient to sustain appellant's conviction of housebreaking.

(3) Whether appellant has shown that his trial counsel was inadequate, due to an alleged failure to call certain witnesses.

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* Cases chiefly relied upon are marked with asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,821

JAMES SOUTHERLAND, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed January 7, 1963, appellant and Charles Rose were charged with housebreaking and larceny (22 D.C. Code 1801, 2201). On March 6 and 7, 1963, appellant and his co-defendant were tried before a jury in the District Court (Tamm, J.) and appellant was convicted as charged. The co-defendant was acquitted. By judgment and commitment filed April 1, 1963, appellant was sentenced to three to nine years imprisonment on each count, the sentences to run concurrently.

The evidence may be summarized as follows:

While Claude Bourne, a security patrol driver, was checking the construction site of the Veterans' Administration Hospital at about 12:30 a.m., December 14, 1962,

he encountered the appellant who tapped him on the shoulder (I. Tr. 3-4, 12-13). When Bourne asked appellant what he was doing there he said that he had a girl friend in his car and that he had once worked at the site (I. Tr. 4, 14). Bourne saw no girl and appellant explained that she had run off after seeing Bourne (I. Tr. 15). Appellant then proceeded toward an automobile, later found to have been registered to one Phillips the mother of Rose, the acquitted co-defendant (I. Tr. 5, 34, 37). Appellant later explained that he lived with Phillips and had borrowed the car from her (I. Tr. 34). An article was protruding from the rear of this vehicle and appellant described the item as "bedding" which he had picked up that day (I. Tr. 5). Bourne examined the protruding material and found that it consisted of a quantity of V-shaped copper (I. Tr. 6). Bourne then asked appellant what he was doing there and appellant "mentioned something about a friend" (I. Tr. 8). At this point Charles Rose—the acquitted co-defendant—appeared on the scene, coming from the direction of the construction work (I. Tr. 8). After ascertaining that neither the appellant nor Rose could produce registration for the automobile Bourne called police who arrived a few minutes later.

A detective arrived on the scene at approximately 12:40 a.m. and ascertained that the items protruding from the automobile in question were "numerous lengths of copper building flashing" (I. Tr. 33). In reply to a question, appellant told the detective that he did not know how the copper material got into the car (I. Tr. 35).

When patrol driver Bourne returned to the building site, after having gone to the police station with police officers, appellant, and Rose, he discovered that a storage trailer had been broken into (I. Tr. 10). This trailer was located about 100 feet from the place where the Phillips car had been parked and 125 feet from the place where Bourne first met the appellant (I. Tr. 10, 13). In the vicinity of the storage trailer Bourne observed several pieces of copper of the same type as those which had been found in the automobile (I. Tr. 10).

At about 7:00 a.m. the same morning a construction superintendent employed by John McShain, Inc. also found the storage trailer to have been broken into (I. Tr. 22). At this same time he discovered that forty sheets of V-shaped copper, worth $400, which were owned by the McShain Corporation, and had been stored in the trailer were missing (I. Tr. 23-25). The pieces found in the Phillips car were taken to the Tenth Precinct station on December 14 (I. Tr. 35) and the copper pieces missing from the storage trailer were seen by the McShain superintendent at the Tenth Precinct station on December 14 (I. Tr. 25).[1] The superintendent further testified that appellant had been an employee of McShain, but that his employment had terminated on December 12 at which time he was paid in full (I. Tr. 26). In the course of his employment appellant had access to the trailer in question and handled the V-shaped copper material (I. Tr. 27).

Appellant, who had two previous housebreaking convictions (II. Tr. 4), testified in his own behalf and said in substance that he had driven the Phillips car to the construction site on December 13 to get his pay, had left the car when he found that he could not start it,[2] and returned later to pick it up when he encountered the security patrol driver. Specifically the appellant testified that after finding that he could not start the car he took a girl to her home, went to certain insurance offices to transact business, proceeded to his own home where he changed clothes, and then returned later to the site where the car had been left. When he arrived at the site he dis-

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[1] The pieces found in the Phillips car and those seen at the station were the same type (I. Tr. 7, 24). There was also evidence that the copper which had been in the storage trailer and the copper found in the car were stacked in the same way (I. 24-25, 36).

[2] The police detective testified that officers were initially unable to start the car but finally did so by using a jumper cable attached to the battery (I. Tr. 36, 41-42). The police also had a key to the car but the detective was unable to specify the source of the key (I. Tr. 39).

covered that he had left the car keys in the clothes which he had changed and then telephoned Rose, telling him to bring the keys. After the phone call he again returned to the site and it was at this point that Bourne arrived (II. Tr. 4-5, 15).

Appellant said that he had originally left the car at the site sometime in the afternoon of December 13 and that it was parked in the same place, some 35 or 40 feet from the office, when he returned at night (II. Tr. 9, 12-15). A McShain watchman who was on duty between 4:00 p.m. and 11:30 p.m. or midnight on December 13 testified in rebuttal that he noticed no strange automobiles in the site area and that had such a vehicle been there he would have seen it (I. Tr. 44, 46-47). The watchman said further that when he inspected the various buildings at the site during his tour on December 13, he found that none of the storage trailers had been broken into (I. Tr. 46).

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 1801, provides in pertinent part:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not * * * with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22, District of Columbia Code, Section 2202, provides in pertinent part:

> Whoever shall feloniously take and carry away any property of value of less than $100, including things savoring of the realty, shall be fined not more than $200 or be imprisoned for not more than one year, or both. * * *

SUMMARY OF ARGUMENT

The evidence showed that appellant purported to exercise dominion and control over an automobile and stolen property therein. At the time in question he referred to the vehicle as "my car" and stood by it. He also admitted possession of the property by referring to it as "bedding I picked up." The property in question, copper building material, had been taken from a storage trailer. Shortly after the stolen goods were found in the automobile, it was discovered that the trailer had been broken into. The car in which the copper goods were found was located only 100 feet from the trailer. The appellant had been employed by the victimized construction corporation and in the course of that employment it was his task to enter the trailer and handle the type of copper which was stolen. On these facts appellant was properly found guilty of larceny and housebreaking.

The claim that appellant's defense counsel was inadequate because of failure to call witnesses involves inherently tactical decisions which are normally not disturbed on appeal. Moreover the contention is completely unsupported by the record which fails in any way to show the substance of the testimony which would allegedly be offered by the witnesses.

ARGUMENT

I. The evidence was sufficient.

(Tr. 4-5, 10, 13, 15, 25, 27, 29-30, 34, 44-46)

Appellant questions the sufficiency of the evidence, arguing that he was not found to be in "possession" of the stolen property; that there was no proof of the housebreaking; and that the McShain corporation was not shown to be the owner of the stolen property. As shown in the Counterstatement, *supra*, the contentions have no merit.

When the security guard first spoke with appellant, appellant referred to having a girl in "my car" and then

stood by the automobile in which the stolen goods were immediately found (I. Tr. 4-5). When asked about the material protruding from the car, which material proved to be the stolen copper, appellant stated that it was "bedding I picked up during the day" (I. Tr. 5). Appellant admitted that at the time in question he had borrowed the vehicle from a woman with whom he lived (I. Tr. 34). Thus it is clear from appellant's own admissions that he was exercising dominion and control over both the car and the stolen property. See *United States* v. *De Sisto*, 329 F.2d 929, 935 (C.A. 2, 1964), *cert. denied*, 377 U.S. 979, where on weaker facts the inference arising from possession of recently stolen property was applied to a defendant who had rented a truck in which the stolen goods were found.

Appellant's possession of the fruits of the housebreaking may be considered together with other evidence to show his complicity in that offense.[3] Here there was evidence that appellant had recently worked in the storage trailer itself and had handled the type of copper stolen from the trailer (I. Tr. 27). The trailer had not been broken into when the night watchman made his rounds, sometime between 8 p.m. and 11:30-12:00 p.m. (I. Tr. 44-46) but after the stolen copper was found in the car and the security guard returned to the site, it was discovered that the trailer had been forcibly entered (I. Tr. 10). Appellant made false and evasive replies when first questioned by the security guard. He said that there was a girl in his car, but the guard saw no girl (I. Tr. 15). He told the guard that what proved to be the stolen copper was "bedding" (I. Tr. 4). Finally there was evidence that the storage trailer involved was located only 100 feet from the place where the car was parked and only 125 feet from the place where the se-

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[3] *Edwards* v. *United States*, 78 U.S. App. D.C. 226, 139 F.2d 365 (1943), *cert. denied*, 321 U.S. 769. Indeed the Supreme Court has held that possession of recently stolen property will alone support the conclusion that the possessor committed the burglary involving the property. *McNamara* v. *Henkel*, 226 U.S. 520 (1913).

curity officer first saw appellant. (I. Tr. 10, 13). Under these circumstances there was ample basis for the conclusion that appellant was guilty of the housebreaking as well as the larceny of the copper material.

The contention that McShain was not shown to be the owner of the stolen goods is plainly refuted by the testimony of Mr. Coppman, a 33 year employee of the corporation and its "superintendent of structure," who said that the copper belonged to John McShain, Incorporated (I. Tr. 25). Coppman explained further that the copper did not belong to any subcontractor but was being handled entirely by the corporation (I. Tr. 29-30).

II. Appellant has not shown that his trial counsel was inadequate.

In substance, appellant contends that his defense counsel refused to subpoena certain named witnesses who were supposed to have supported the defense case (Br. p. 12), and that he is, therefore, entitled to retrial at the least. The contention has no legal or factual substance.

Generally the decision as to whether or not to call certain witnesses is purely a matter of tactical choice on the part of the trial counsel. Perhaps the witnesses are not as helpful as the client may believe. Perhaps their appearance may be so poor as to discredit a case. Perhaps they are subject to particularly effective impeachment or rebuttal. It is for this reason—the essentially tactical nature of the problem—that claims of inadequate representation involving the failure to call witnesses have met with virtually no success in this or other circuits. See *e.g. Bolden* v. *United States*, 105 U.S. App. D.C. 259, 266 F.2d 460 (1959) (where an alibi witness was not called because a companion of the defendant had already repudiated the purported alibi); *Gray* v. *United States*, 112 U.S. App. D.C. 86, 299 F.2d 467 (1962) (where two alibi witnesses were not called because they contradicted one another on an important particular); *Tompa* v. *Commonwealth of Virginia*, 331

F.2d 552 (C.A. 4, 1964) (where it appeared that the witness in question was intoxicated on the day of trial, was usually intoxicated anyway, and further, would not have helped the defendant). See also *O'Malley* v. *United States*, 285 F.2d 733 (C.A. 6, 1961) where the Sixth Circuit fully discussed the problem confronting counsel in making the tactical decision as to whether to call witnesses and concluded by rejecting a claim similar to that at bar.

Moreover, apart from the fact that such tactical choices are generally not disturbed on appeal, the instant argument is further defective in that it is utterly unsupported by the record. The point was never pressed before the District Court, although it was mentioned vaguely in two *pro se* post-verdict motions,[4] and there has been no effort before either the District Court or this Court to develop the contention by anything more than appellant's own assertions as to what the witnesses would say. With the record in this posture, there is simply no factual basis for review.[5]

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[4] One motion in "arrest of judgment" spoke of the court having not allowed the witness to testify. Another motion, for leave to proceed *in forma pauperis* alleged the "failure to call defense witnesses" as a ground on appeal. (See motions in record).

[5] Compare *Gray* v. *United States*, Misc. No. 1586 (1961) (later to become *Gray* v. *United States*, 112 U.S. App. D.C. 86, 299 F.2d 467 (1962)), where the appellant filed affidavits from the missing witnesses and this Court, while denying leave to proceed, indicated that he might pursue the matter in the District Court. In the case at bar, not even this basic step has been taken and the instant contention is therefore much weaker than that in *Gray*—which ultimarely resulted in an affirmance of conviction.

CONCLUSION

Wherefore, it is submitted that the judgment of the court below should be affirmed.

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